

APPENDIX A

Enacted November 4, 1969
Effective November 4, 1969

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

SEPTEMBER LEGISLATIVE SESSION 1969

CHAPTER 33

BILL No. 46-69

AN ACT to add two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968; to create a Commission on Human Relations who shall research, study, advise and investigate matters relating to any practice of discrimination, prejudice, intolerance or bigotry that may exist on account of race, color, religious creed, ancestry or national origin; shall exercise educational programs and use persuasion in the elimination of such practice; to initiate or receive complaints of discrimination, prejudice, intolerance and bigotry which deprives persons of equal rights, protection or opportunity; to seek conciliation of such complaints and make recommendations, procedures, programs or legislation to eliminate discrimination; to proceed with other programs to relieve group tension from causes not related to race, color, religious creed, ancestry or national origin; to create a Commission Panel on Public Accommodations in accordance with administrative and constitutional due process to prohibit discriminatory practices against any person on account of race, color, religious creed, ancestry or national origin in every place of public accommodation, resort or amusement of any kind,

in Montgomery County, Maryland, whose facilities, accommodations, services, commodities or use are offered or enjoyed by the general public, either with or without charge, but shall not include any accommodations which are in their nature distinctly private, and to assure nondiscrimination to all persons, coexistent with the intent and purposes but not necessarily the scope or limitation of the Public Accommodations Provision of the United States Civil Rights Act of 1964; to assure enforcement of the provisions of this enactment within its terms; and to have the County Executive, with the approval of the County Council, appoint members to the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing.

Be It Enacted by the County Council for Montgomery County, Maryland, that—

Sec. 1. There are hereby added two new articles to the Montgomery County Code 1965, to be known as Article I, title "Commission on Human Relations," and Article II, title "Discrimination in Places of Public Accommodation," Chapter 77, to directly precede Chapter 77, Section 77-13 as enacted by Chapter 19 of the Laws of Montgomery County 1968, to read as follows:

Article I. Commission on Human Relations

Sec. 77-1. Statement of Policy.

It is hereby declared to be the public policy to eliminate discrimination, prejudice, intolerance or bigotry of any forms that may exist on account of race, color, religious creed, ancestry or national origin.

It is further declared to be the public policy of the county that discrimination in housing and places of public accommodation against any person on account of race, color, religious creed, ancestry or national origin is contrary to

the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished.

Sec. 77-2. Created; membership, appointments and term of office of members; Commission Panels.

There is hereby established a Commission on Human Relations. The Commission shall consist of not less than nine (9) members and not more than fifteen (15) members to be appointed and may be removed for cause by the County Executive with the approval of the County Council and who shall be broadly representative of the racial, religious, and ethnic groups of the County. The terms of the members of the Commission shall be for one, two, or three years, as prescribed by the County Executive at the time of appointment, so as to provide for the vacating of the terms of one-third of the members of the Commission annually. Each member of the Commission shall continue to serve after his term until his successor has been appointed and has qualified. The County Executive, with the approval of the County Council, shall appoint a Commission Panel on Public Accommodations, a Commission Panel on Housing, and any further panel as determined by law.

Sec. 77-3. Officers; meetings; quorum; voting.

The County Executive may designate a member of the Commission on Human Relations to be Chairman and, in the absence of any member being designated, the Commission may elect a Chairman notwithstanding their authority to elect such other officers as it may deem necessary. The Commission shall hold meetings at regular intervals but not less frequently than once every month. A majority of the members of the Commission shall constitute a quorum for the transaction of business, and a majority vote of those

present at any meeting shall be sufficient for any official action taken by the Commission.

Sec. 77-4. Executive Secretary; additional personnel; budget preparation.

A member of the County Executive's staff or his acting designee shall serve as executive secretary of the Commission on Human Relations and shall assist the Commission Panels as determined by law. Other personnel and facilities may be authorized by the County Executive to assist the Commission in carrying out the provisions of this Chapter. The Commission may, with the approval of the County Executive engage the services of volunteer workers and consultants without salary, who may be reimbursed their out-of-pocket expenses incurred in the course of performing such services. Services of an individual as a volunteer worker or consultant pursuant to this Chapter shall not be considered as service of employment bringing such individual within any Merit System of the County or State of Maryland. In proposing a budget for the operation of the Commission and in selecting other personnel and facilities the County Executive shall take into consideration the recommendations of the Commission.

Sec. 77-5. Compensation and expenses of members.

The members of the Commission on Human Relations shall serve without compensation, but they may be reimbursed for all expenses necessarily incurred in the performance of their duties in accordance with appropriations made by the County Council.

Sec. 77-6. Duties generally.

(1) The Commission on Human Relations shall have the power and it shall be its duty:

(a) To research, assemble, analyze, and disseminate pertinent data and educational materials relating to activities

and programs which will assist in the elimination of prejudice, intolerance, bigotry, and discrimination, and to institute and conduct educational and other programs, meetings, and conferences to promote equal rights and opportunities of all persons regardless of their race, religious creed, ancestry or national origin and to promote good will, cooperation, understanding, and human relations among all persons of different races, colors, religious creeds, ancestries or national origins. In performance of its duties, the Commission shall cooperate with interested citizens, racial, religious and ethnic groups, community, business, professional, technical, educational and civic organizations.

(b) To cooperate with the County Executive; and all governmental agencies concerned with matters within their jurisdiction.

(c) To study and investigate by means of public or private meetings, conferences and public hearings conditions which may result in discrimination, prejudice, intolerance and bigotry because of race, color, religious creed, ancestry or national origin.

(d) To advise and counsel the residents of Montgomery County, the County Council, the County Executive and the various departments of County, State and Federal governments on matters involving racial, religious, or ethnic prejudice, intolerance, discrimination and bigotry and to recommend such procedures, program or legislation as it may deem necessary and proper to promote and insure equal rights and opportunities for all persons, regardless of their race, color, religious creed, ancestry or national origin.

(e) To work to remove inequalities due to discrimination, prejudice, intolerance and bigotry on such problems as housing, recreation, education, health, employment, public accommodations, justice and related matters.

(f) To initiate or receive complaints of discrimination, prejudice, intolerance and bigotry from any person or group

because of race, color, religious creed, ancestry or national origin which deprives that person or group of equal rights, protection or opportunities. To investigate complaints, seek conciliation of such complaints, and if warranted, to hold hearings and make recommendations on such complaints. Neither the Commission as a whole, nor any of its members not serving on a panel, shall engage in any of the functions or jurisdictions assigned to a Commission Panel or the Executive Secretary.

(g) To adopt such rules and procedures as may be necessary to carry out the purposes and provisions of this Chapter; to keep a record of its hearings, activities, and minutes of all meetings, said records and minutes shall be on file with the Executive Secretary of the Commission and open to the public at reasonable business hours upon request.

(h) To render at the request of the Executive or within thirty (30) days following each quarter of the calendar year preliminary written or oral reports of its activities and recommendations to the County Executive and the County Council and a final written yearly report summarizing its activities, goals, needs, and recommendations.

(2) Despite the foregoing provisions of this law, the Commission is authorized to proceed with other programs which will seek to relieve group tension and/or adverse intergroup activities which may result from causes not related to race, color, religious creed, ancestry or national origin provided that such action is first submitted to the County Executive and further provided that the County Executive does not disapprove such action.

Sec. 77-8. Committees, Advisory Committees.

The Chairman of the Commission on Human Relations may, with the approval of the Commission, appoint com-

mittees from its members to assist in carrying out any of the functions and duties of the Commission. Any committee appointed shall consist of not less than three members.

The Chairman of the Commission may appoint advisory committees of citizens and at least one Commission member as in his judgment will aid in effectuating the purposes of this Article. Advisory committee action shall not be deemed to be the actions of the Commission and shall in no way bind the Commission or its members.

Article II. Discrimination in Places of Public Accommodation.

Sec. 77-9. Applicabilty of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall apply and be applicable to every place of public accommodation, resort or amusement of any kind in the county whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: All restaurants, soda fountains and other eating or drinking places and all places where food is sold for consumption either on or off the premises; all inns, hotels, and motels, whether serving temporary or permanent patrons; all retail stores and service establishments; all hospitals and clinics; all motion picture, stage and other theaters and music, concert or meeting halls; all circuses, exhibitions, skating rinks, sports arenas and fields, amusement or recreation parks, picnic grounds, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool rooms and swimming pools; all places of public assembly and entertainment of very kind; but shall not include any accommodations which are in their nature distinctly private.

Sec. 77-10. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, religious creed, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

(b) To display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication or advertisement which states or implies that any facility, service, commodity or activity in such place of public accommodation, resort or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's race, color, religious creed, ancestry or national origin.

Sec. 77-11. Commission Panel on Public Accommodations; Authority Enforcement procedures.

(a) The Commission's Panel on Public Accommodations shall be selected and have the functions enumerated in Section 77-13(d), Chapter 19 of the Laws of Montgomery County 1968.

(b) The Commission Panel on Public Accommodations shall have the authority and power enumerated in Section 77-16, Chapter 19 of the Laws of Montgomery County 1968, except that Section 77-16(a) thereof insofar as it applies to Sec. 77-11(b) herein shall be concerned with public accommodations in lieu of housing and real property matters.

(c) The Commission Panel on Public Accommodations shall have the procedures for enforcement as enumerated in Section 77-17, Chapter 19 of the Laws of Montgomery County 1968.

Sec. 77-12. Penalty for violation of article; injunctions.

Any person who violates any of the provisions of this Article relating to discrimination practices, or any rule or regulation pertaining thereto, shall be subject to injunctive or other appropriate action or proceeding to correct any violation of this Article, and any Court of competent jurisdiction may issue restraining orders, temporary or permanent injunctions or other appropriate forms of relief.

Sec. 2. Notwithstanding Section 77-2 and on the effective date hereof, the appointment and terms for members of the Commission on Human Relations, Commission Panel on Public Accommodations and Commission Panel on Housing shall be those members and such remaining terms thereof that existed on September 11th, 1969.

Sec. 3. The provisions of these Articles are severable and if any provision, section or part thereof is held invalid it shall not affect or impair any of the remaining provisions.

Sec. 4. The County Council declares an emergency exists as to the need of the enactment of Article I and II of Chapter 77, and the above shall become effective immediately upon adoption.

Sec. 5. Prior to December 7, 1970, the word "County Executive" shall mean the County Council except in Section 77-4 where it shall mean County Manager.

Certified correct as passed.

President

Secretary

APPENDIX B

MONTGOMERY COUNTY COMMISSION ON HUMAN RELATIONS
PANEL ON PUBLIC ACCOMMODATIONS

CASE No. P. A. 6

MR. AND MRS. MURRAY TILLMAN AND DR. AND
MRS. HARRY CODY PRESS, *Complainants*

v.

WHEATON-HAVEN RECREATION ASSOCIATION,
INC., *Respondents***Opinion, Including Findings of Fact, Conclusion of Law,
Panel Decree and Final Order**

On September 17, 1968, Mr. and Mrs. Murray Tillman instituted a complaint against the respondent, Wheaton-Haven Recreation Association, Inc., alleging violation of the County Public Accommodations Ordinance, Chap. 77, Sec. 77-9 and 10, Laws of Montgomery County (1968) (hereinafter referred to as the "Ordinance").

The basis of the complaint alleges that on July 24, 1968, Mrs. Grace Rosner, a Negro, was refused admittance to respondent's pool as a guest of the Tillmans, bona fide members of respondent. This refusal to admit Mrs. Rosner was allegedly based upon her lack of family relationship to a member despite the fact that she was admitted as a guest on July 19, 1968 and the family relationship criteria was not applied to Caucasian guests. The complaint also made reference to a long-standing policy of systematic racial discrimination and deprivation to some of respondent's members of their basic legal rights. These allegations were supported by accompanying affidavits, executed by several members of respondent.

On November 13, 1968, Dr. and Mrs. Harry Cody Press also instituted a complaint against the respondent, similarly alleging a violation of the Ordinance. The Press complaint

was based upon allegations that they were deprived of a membership application and subsequent admission to membership in May, 1968, solely on the ground that they are Negroes.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the Executive Secretary of the County Human Relations Commission, Bertram L. Keys, Jr., conducted an investigation of the facts and made a finding of probable cause to credit the allegations contained in the complaints. Mr. Keys also attempted unsuccessfully to conciliate the matter pursuant to the foregoing section of the Ordinance and has notified respondent that his office is still available for this purpose up to and including the present date.

The Commission's Panel on Public Accommodations ordered the complaints consolidated for a determination of the common issue involved and conducted a public hearing at 8:00 o'clock P.M., April 24, 1969, in the first floor auditorium of the County Office Building, 108 South Perry Street, Rockville, Maryland. The hearing was conducted pursuant to Sec. 77-5(3)(b) of the Ordinance.

The panel consisted of Gerald D. Morgan, Chairman and Presiding Officer, Dr. Thomas A. Cook, Jr., and Lawrence D. Burke, Commissioner. The case in support of the complaints was presented by Philip J. Tierney, Esq., Assistant County Attorney. Also participating were Stanley D. Abrams, Esq., Assistant County Attorney, and Samuel A. Chaitovitz, Esq., of the American Civil Liberties Union, representing Mr. and Mrs. Tillman.

Pursuant to Sec. 77-5(3)(b) of the Ordinance, the respondent was summoned to appear through four (4) representatives alleged in the complaint to have fostered the violation of the Ordinance. The four, Philip Trusso, Bernard Katz, Anthony J. DeSimone, and Brian Carroll, avoided the summons and did not appear. Counsel for respondent, William N. Dunphy, Esq., appeared and ad-

vised the Panel that his client did not choose to be present and challenged *inter alia* the jurisdiction of the Panel to conduct the hearing as respondent was alleged to be distinctly private in nature. Mr. Dunphy advised the Panel of equitable relief sought on behalf of respondent in the Circuit Court for Montgomery County and requested the hearing be suspended pending the outcome of his litigation. The Panel overruled respondent's motion. Mr. Dunphy then left and the Panel proceeded with the hearing.

As a result of all the evidence received at the public hearing, the Panel members make the following findings of fact, conclusion of law, decision, and final order.

FINDINGS OF FACT

1. The complainants, Mr. and Mrs. Murray Tillman, are taxpaying residents of the County and have been bona fide members of respondent since 1961.

2. The complainants, Dr. and Mrs. Press, have been taxpaying residents of the County since 1965. The Presses are Negroes. They live within the prescribed geographical boundaries, as contained in respondent's By-Laws, that would make them available for membership in respondent.

3. Respondent, Wheaton-Haven Recreation Association, Inc., is a non-profit Maryland corporation organized on May 23, 1958 for the purpose of operating a swimming pool for the recreation of the prescribed community. The respondent's business address is 10910 Horde Street, Silver Spring, Maryland, 20902.

4. Respondent pool was constructed in 1958-1959 subsequent to a special exception granted September 23, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(Z-4), Montgomery County Code (1955).

5. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28,

dated May 24, 1955. The Council stated therein that "... this action sets up the community swimming pools as a special exception. . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

6. On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, respondent application for the special exception. The record of these proceedings indicates that respondent's witnesses testified that the County was unsuccessfully approached to construct a pool, that in lieu of County action respondent initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

7. Prior to the grant of the special exception, the Board required respondent to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed. During early 1958, respondent conducted an intensive membership drive. A circular was published and distributed to surrounding neighborhoods and communities that requested an immediate and unqualified call for membership. Apparently no Negroes lived within the geographic area of the pool at the time. Door-to-door solicitations were conducted by respondent members to obtain membership and a minimum Twenty Dollar (\$20.00) pledge. No qualifications were placed upon the respondent solicitors regarding membership criteria. On July 9, 1958 an open meeting was conducted by respondent's promoters on public grounds, the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, to further solicit and promote membership. These efforts resulted in meeting the zoning requisites.

8. During hearing before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859—Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. The pools were held to provide a healthy and constructive outlet for youth and general benefit to the public at large. The pools provide recreation to lower middle income groups that would otherwise be unavailable. The community pool was held distinguished from private country clubs and their attendant social program.

9. On June 12, 1962, the County Council adopted the Ordinance, Sec. 2 of which specifically provided that the definition of a public accommodation shall include swimming pools. At the time the Ordinance was enacted, there were no public, government-operated, swimming pools in existence within Montgomery County. There were, however, forty-three (43) community pools in operation in the County, including respondent.

10. Respondent is exempt from and does not pay federal or state income taxes under the provision of the U. S. Internal Revenue Code, Chapter 501, Sec. C(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Respondent also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted respondent because of its function as a community swimming facility.

11. Respondent operates exclusively as a community swimming facility conducting no social functions and its membership is solicited solely for that recreational purpose.

12. Before 1964 respondent did not conduct personal interviews with applicants. Recently respondent has insti-

tuted a policy of conducting personal interviews with applicants, but no social, formal or business background data is obtained from these interviews. The sole purpose of the interview is apparently to observe the physical appearance of the applicant.

13. Membership in respondent is not personal to the individual but runs to family units.

14. Respondent's By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership which is limited only to a prescribed geographic area and thirty (30) percent of the total membership may be excluded from that limitation.

15. By 1967 the neighborhood within the prescribed geographic area was a well-integrated community.

16. No Caucasian applicant has ever been rejected for membership in respondent.

17. Respondent, until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that respondent membership was open.

18. Until the summer of 1964, no racial discrimination policy was overtly manifested by respondent. That summer respondent refused to permit integrated swimming teams to utilize respondent facility. Some of respondent's members protested this policy and sought to change it. However, on November 11, 1964, at the annual open membership meeting of respondent, a proposal to change the swim team racial policy was rejected.

19. Subsequently, respondent refused to admit into the pool Negro babysitters who cared for children of members, while Caucasian babysitters of members were admitted.

20. On July 19, 1968, Mrs. Grace Rosner, a Negro, accompanied the Tillmans as their guest to respondent pool

and was admitted to the pool despite an altercation with Anthony J. DeSimone, who attempted to prohibit the admission of Mrs. Rosner. On July 24, 1968, Mrs. Rosner returned to the pool with the Tillmans, but was denied admission because of a newly promulgated rule that limited guests only to relatives of respondent members. This rule was not in existence prior to July 20, 1968. The rule was not enforced toward Caucasian guests. The respondent, through its gate attendants and officers, instructed members to lie about the relationship of their Caucasian guests, thereby avoiding the application of the rule.

21. In April, 1968, respondent, upon a good faith inquiry, failed to send a membership application to Dr. and Mrs. Press. The Presses have been and presently are willing to join respondent and are able to assume the financial responsibilities of membership. The Presses intended to use respondent pool as a convenient recreational facility that is available to their Caucasian neighbors and the Caucasian playmates of their children. In May, 1968, respondent officials expressly refused to consider the Presses for membership solely because of their race.

22. Brian Carroll, Anthony J. DeSimone, Bernard Katz, and Philip Trusso, officials of respondent, published and promoted on several occasions to witnesses appearing before the Panel that respondent pool was segregated and had a policy to continue such segregation.

23. On November 12, 1968, at a general membership meeting, the membership of respondent, by a vote of 81-25, endorsed the discriminatory policies practiced to that date.

CONCLUSIONS OF LAW

The core issue deals with whether the composition of people gathered at a swimming pool open to the neighborhood must include Negro friends and neighbors. If the complainants possess legally protected rights which respondent has abused, the respondent's conduct must

be circumscribed to comply with these rights. The respondent planned and built a swimming pool with its own funds to provide recreation for a prescribed community in Wheaton. Respondent contends the pool is private, that complainants have no rights concerning the pool, and it is free to pick and choose those who can swim. The view we take renders these contentions sophistic.

I

A party claiming exemption from the Ordinance as an organization distinctly private in nature has the burden of demonstrating this assertion. Respondent's failure to appear and present evidence of a private nature does not help its case, but the purposes of our analysis we have attempted to view the facts in a light most favorable to respondent. The exemption to the Ordinance was designed to cover private organizations created to protect the personal associational preference of its members. However, a naked claim that an organization is private in nature will not stand if an examination reveals the organization lacks the characteristics usually attributed to such a private organization. We shall first examine respondent's qualification for this exemption.

The pool was built and operated solely as a community recreational facility and possesses none of the accoutrements of a private club, that is, rank, society, and selectivity. The pool has been accessible to the entire neighborhood Caucasian population without qualification. In fact, respondent's By-Laws allow thirty (30) percent of the membership to come from the *public at large*. The only concrete membership standard that has surfaced during respondent's existence is the ability to pay. The pool operates no social programs and the membership itself runs to the family unit rather than the individual. That respondent exercises no policy of genuine selectivity is manifested by the open invitation to neighborhood Caucasians with no evidence any of these applicants were ever rejected.

The recent employment of the interview device and a relatives-only guest rule supposedly throws a blanket of selectivity over respondent. However, the facts indicate these methods were merely a subterfuge, the objective of which was to test the color of the applicants' skin and exclude Negroes. Neither device has been applied consistently to Caucasians nor has respondent ever pursued a policy of exclusiveness toward Caucasians. By application of these afterthoughts, respondent attempts to take on a new appearance; we find he cannot use such methods to make a private club out of an organization with an alien nature.

But perhaps the most conclusive evidence of respondent's true nature can be found in the testimony submitted on its behalf before the zoning authority. That testimony gave no hint of a private nature or an interest by respondent in being so classified. Respondent's very existence and purpose was heralded as a public benefit—juvenile delinquency would be curtailed, restless youths would be given a playground, and an imperative community recreational need would be satisfied. To now contend that respondent is distinctly private in nature after the benefits of a favored status accorded by the government have been enjoyed since 1958 would cast considerable doubt on respondent's good faith and credibility. We therefore hold respondent has never been distinctly private in nature.

The factor which absolutely convinces us that respondent is a public accommodation is a reading of the Ordinance which expressly covers swimming pools. When the Ordinance was enacted by the County Council in 1962, forty-three community pools were in operation, including respondent. There were no government-operated pools in existence and community pools were the closest to the definition, "public." It would appear that the Council intended such swimming pools to be classified as a public accommodation since such was the holding by the Maryland Court of Appeals before enactment of the Ordinance.

Drews v. State, 224 Md. 186, 167 A.2d 341 (1960). If the Council intended to limit the definition of swimming pools to exclude the community pools, an exception could have easily been written into the Ordinance as was the case with taverns. Furthermore, the list of public accommodations could have excluded recreational areas as was the case with the State law. *Maryland Code*, Art. 49B, § 11, *et seq.* Therefore, it is only reasonable to infer from the ordinary meaning of the words used that the Ordinance was intended to cover community swimming pools, the only swimming pools in existence at the time. We hold that respondent is a public accommodation within the meaning of the Ordinance.

II.

Beyond the technical application of the Ordinance, serious questions concerning the substantive application of the Ordinance have been raised by respondent's particular conduct toward the complainants. The nature of respondent's operation, its government subsidies, open solicitation of Caucasian membership, and the public benefit aspects of its construction and operation give rise to a classification of respondent as a public function under the doctrine of *Evans v. Newton*, 382 U.S. 296 (1966). Therefore, respondent would be subject to the same limitation as the State.

The sale of real estate within the prescribed area contained in respondent's By-Laws is enhanced because of the proximity, accessibility, and advantages incident to a community swimming pool. This factor will allow Caucasians to sell to Caucasians at a premium. Negroes must pay the premium without receiving the corresponding benefits or forego purchase of a house in the prescribed area. The result of this policy deprives the Negro of basic legal rights.

Some pool members are forced, through the inconsistent application of the relatives-only guest policy to limit their

social experiences or forego use of the pool. The result of such an arbitrary standard is to circumscribe and discourage the free associational conduct of these members and also deprives them of basic legal rights.

The full thrust of respondent's policy would tend to discourage Negroes from moving into the prescribed area. In effect, respondent, through its policy of systematic discrimination, has created a racial zoning ordinance without County sanction. These are areas that the public accommodations ordinance is certainly intended to protect and respondent, as public function, may not operate to derogate this intent. It is therefore unlawful for any place of public accommodation in the County to practice racial discrimination in granting membership or admitting guests when guests are so provided by the organization's own regulations. However, in the instant case, it has been demonstrated that respondent received and continues to receive special treatment by the government in the form of tax exemptions, liberal zoning laws, and various other consideration during the initial building stage. These factors tend to impose an even higher standard of duty upon respondent to refrain from practicing racial discrimination.

III.

The several incidents of alleged racial discrimination are well supported and uncontroverted. A Negro was excluded from the pool as a guest of a bona fide member on the basis of lack of relationship to member. However, Caucasians were admitted with the same lack of membership and told to lie about it. It is clear the family relationship rule and its application was a mere contrivance to exclude Negroes from an otherwise open facility. Such practices are unlawful.

A Negro family applied for pool membership while filling all of the apparent requisites set for Caucasian applicants. Their unexplained exclusion was clearly discriminatory and unlawful.

Several respondent officials published and promoted the racial discrimination policy stated above, also in violation of the Ordinance. It is clear from a total view of respondent's conduct over the years that it has practiced an unlawful and systematic policy of racial discrimination. The respondent was clearly an open facility regarding Caucasian guests and residents. The only restrictions were applied toward the Negro guest and resident.

PANEL'S DECISION

And now, May 29, 1969, upon consideration of all the evidence submitted at the public hearing of this case, the finding of fact, and the conclusion of law, the Montgomery County Human Relations Commission Public Accommodation Panel unanimously finds and determines:

1. The Panel has jurisdiction over respondent, over the subject matter of this proceeding, and over the instant complaint.
2. The respondent, Wheaton-Haven Recreation Association, Inc., is a public accommodation as that term is defined in the Ordinance, Sec. 77-9.
3. The respondent has refused, withheld from, and denied to the complainants, solely because of race, the accommodations and advantages of the respondent's community swimming pool, either as members or guests, and consequently respondent has committed and continues unlawful discriminatory practice in violation of the Ordinance, Sec. 77-10.
4. Respondent, operating as a public function and under the Ordinance, cannot promote policies of racial discrimination excluding Negroes to the extent its facilities are available and open to Caucasians.

FINAL ORDER

And now, May 29, 1969, upon consideration of the foregoing, and pursuant to Sec. 77-5 of the Ordinance, it is hereby ORDERED:

1. That the respondent, Wheaton-Haven Recreation Association, Inc., its agents, employees and members, shall cease and desist from directly or indirectly refusing, withholding from, or denying to complainants and other persons, because of their race, color, religion, creed, ancestry or national origin, the accommodations and advantages of membership and guest privileges in the respondent community swimming pool facility or the use and enjoyment thereof.

2. That the respondent, Wheaton-Haven Recreation Association, Inc., shall take the following affirmative action which in the judgment of the Panel will effectuate the purposes of the Ordinance.

a. Instruct all its members, officers, managers, and employees, in writing, to comply with the requirements of Paragraph 1 of this Final Order. Copies of such written instruction, signed by all of respondent's officers, managers, and employees, acknowledging receipt and understanding thereof shall be transmitted to the Panel within fifteen (15) days after service of this Final Order.

b. Notify all members of respondent, in writing, that henceforth the policy and practice of respondent will be to serve any guest of a member regardless of his race, religion or national origin and that new members will be considered without regard to race, religion or national origin. A copy of such written communication shall likewise be transmitted to the Panel.

3. Failure to comply with this Order within the specified time will subject the respondent and its officers, jointly and severally, to the liabilities imposed by the Ordinance. This in no way limits the Panel or the Human Relations

Commission from pursuing any of the rights and remedies provided by law.

BY ORDER OF

THE MONTGOMERY COUNTY, MARYLAND,
HUMAN RELATIONS COMMISSION PANEL
ON PUBLIC ACCOMMODATIONS

GERALD D. MORGAN, *Chairman*
DR. THOMAS A. COOK, JR.
LAWRENCE D. BURKE

APPENDIX C**Case No. 656****PETITION OF WHEATON-HAVEN RECREATION
ASSOCIATION, INC.**

(Hearing held August 13, 1958 and August 23, 1958;
case decided September 20, 1958)

Opinion of the Board

This is a petition for a special exception under Section 107-28z-4 of the Zoning Ordinance (Chap. 107, Mont. Co. Code 1955, as amended) to permit the construction and use of a community swimming pool on 4.174 acres, being a part of a tract known as "John Fitzgerald", on the west side of Horde Street, Silver Spring, Maryland, in an R-60 zone.

The petitioner proposes to limit its membership to 325 families. The pool will operate approximately from June 1 to September 1, and will be open during weekdays no earlier than 9 a.m. and no later than 9 p.m. On Sundays, it will open no earlier than 1 p.m. and close no later than 9 p.m.

Exhibit No. 30 is a letter stating that the petitioner agrees to regulate its activities in a specific manner described therein so as not to disturb the members of a nearby Church.

Several residents in the area of the proposed pool appeared at the public hearing in opposition to the petition. Their objections were based primarily on traffic conditions resulting from use of the proposed pool. Considerable evidence was introduced on this point. In connection with this, as well as the objections based on noise, property values and the like, the County Council has provided that with respect to community swimming pools, the following standards, applicable to all other types of special exceptions, shall not govern the decision of the Board:

"(1) The proposed use does not affect adversely the General Plan for the physical development of the

District, as embodied in this Ordinance and in any Master Plan or portion thereof adopted by the Commission; and

"(2) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood;" (See Section 107-26a(1) & (2)).

The standard which, instead of the above, is applicable in all community swimming pool cases is that "such use will not affect adversely the present character or future development of the surrounding residential community." (See Section 107-28z-4).

The evidence introduced at the public hearing is more than sufficient to sustain a favorable finding with regard to the applicable standard stated above. The record shows that the residential character and future development of the community surrounding the pool will not be adversely affected. The access roadways to and from the proposed pool are not ideal for the purpose involved, but the evidence shows that this is not so severely detrimental as to preclude us from finding that there will be no adverse affect on the present character or future development of the surrounding residential community. (Compare *Petition of Chevy Chase Recreation Association, Inc.*, Case No. 602). We believe, after examining all the evidence before us, that the petitioner has sustained the burden of proof with respect to applicable requirements of Section 107-28z-4. We find, therefore, that they have been met.

The special except for the proposed use, in the manner proposed in the exhibits and testimony, is *granted*.

The Board adopted the following Resolution:

"Be it Resolved by the County Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the Resolution required by law, as its decision on the above-entitled petition."

The foregoing Resolution was proposed by Mr. Henry J. Bison, Jr., Vice Chairman, and concurred in by Mr. William A. Quinlan, Chairman, constituting all the members of the Board.

EDWERTA B. BARKER

ATN

Clerk to the Board

I do hereby certify that the foregoing Minutes were officially entered upon the Minute Book of the County Board of Appeals this 23rd day of September, 1958.

EDWERTA B. BARKER

ATN

Clerk

APPENDIX D

POplar 2-6000
22 South Perry Street
Rockville, Md.

HENRY J. NOYES
Attorney at Law

July 9, 1970

Mr. Gerald D. Morgan
Human Relations Commission
of Montgomery County
Rockville, Maryland

Re: Wheaton-Haven Recreation Association, Inc.

Dear Sir:

It has come to my attention that you have caused letters to be sent to various private swimming pools, in Montgomery County, including the above named corporation, whom I represent, stating that such pools are public accommodations. You apparently base this allegation on the narrow decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229.

May I refer you to Opinion of the Honorable Edward S. Northrop filed July 8, 1970, in the case of *Tillman, et al v. Wheaton-Haven Recreation Association, Inc., et al*, Civil No. 21294, United States District Court for the District of Maryland. Judge Northrop has held, inter alia, that the *Sullivan* case does not apply to Wheaton-Haven, that Wheaton-Haven is a private club, and may discriminate racially, if its Board of Directors so chooses.

You are hereby notified that any further action by you, either individually, or as a member of the Human Relations Commission, will be considered an invasion of privacy, answerable in damages. Further, I notify you as a member of the panel on public accommodations that all persons act-

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ing in concert with you in this regard, including Bertram L. Keys, and your associates on the said panel, will also be asked to respond in damages if you persist in these illegal and unauthorized actions.

Sincerely,

H. J. NOYES

Henry J. Noyes

HJN:dlp